Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

GILBERTO BARRIOS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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26 pp

QUESTIONS PRESENTED

I.

WHETHER THE PANEL DECISION DIRECTLY CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *APPRENDI V. NEW JERSEY*, 120 S.CT. 2348 (JUNE 26, 2000), AND OTHER CIRCUIT COURT DECISIONS, IN VIOLATION OF THE FIFTH AMENDMENT INDICTMENT AND DUE PROCESS CLAUSES, AS WELL AS THE SIXTH AMENDMENT NOTICE AND JURY TRIAL CLAUSES, SINCE THE INDICTMENT DID NOT CHARGE AN AMOUNT OF COCAINE, THE JURY WAS NOT INSTRUCTED AS SUCH, AND THE JURY MADE NO DETERMINATION REGARDING THIS ESSENTIAL ELEMENT OF THE OFFENSES CHARGED?

II.

WHETHER THERE IS A DIRECT CONFLICT BETWEEN THE CIRCUITS WHERE A *PER SE* REVIEW STANDARD IS BEING USED IN APPLYING THIS COURT'S DECISION IN *APPRENDI* WHERE THE DEFENDANT'S SENTENCE EXCEEDS THE STATUTORY MAXIMUM SENTENCE OF TWENTY (20) YEARS UNDER 21 U.S.C. SEC. 841(b)(1), AND THE ELEVENTH CIRCUIT HAS HELD THAT "PLAIN ERROR" REVIEW APPLIES TO *APPRENDI* ERROR, BUT, EVEN UNDER THE PLAIN ERROR REVIEW, CIRCUIT COURTS HAVE FOUND THAT A SENTENCE ABOVE THE STATUTORY MAXIMUM AFFECTS THE DEFENDANT'S SUBSTANTIAL RIGHTS?

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, GILBERTO BARRIOS, by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit, entered in the proceedings on December 18, 2001, and petition for rehearing denied March 1, 2001.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered a non-published opinion, *United States v. Gilberto Barrios,* Case No. 99-10718-EE (11th Cir. December 18, 2000).

JURISDICTION

The judgment of the Court of Appeals affirming the judgment of the United States District Court was entered on December 18, 2000. A timely petition for rehearing was filed, and denied on March 1, 2001. This petition is timely filed pursuant to Rule 20, Rules of the Supreme Court, as amended. The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL PROVISIONS

U.S. CONST. AMEND. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person . . . be deprived of life, liberty, or property, without due process of law; . . .

U.S. CONST. AMEND. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation;. . . .

STATEMENT OF THE CASE

The Petitioner, Gilberto Barrios, was granted leave by the Court of Appeals during the appeals proceedings, to file a supplemental brief raising the issue of his illegal sentence, pursuant to *Apprendi v. New Jersey*, 120 S.Ct. 2348 (June 26, 2000). The *Apprendi* case was decided by this Court subsequent to the Appellant filing his initial brief but during the briefing period, and well prior to the Court's decision.

In the Court of Appeals decision, the Court refers to "Appellants' " in the conjunctive when addressing the

Apprendi claim raised. The Appeals Court, relying on a "plain error" standard of review, concluded that Barrios was not entitled to relief, since his substantial rights were not affected by the imposed sentence. (Op. at p.10). The Appeals Court reached this conclusion relying solely on the factual assertions set forth by the Probation Officer in the Presentence Report, and adopted by the sentencing Judge. (Op. at p. 9) No specific factual findings were made by the sentencing Judge. Notably, the Court of Appeals could not make any reference to trial evidence or any finding by the jury as to Barrios regarding the amount of cocaine he allegedly conspired to possess and possessed with the intent to distribute, since it did not exist.

The Indictment filed in this case did not include the essential element of the amount of cocaine involved in the crimes charged of conspiracy to possess and possession with the intent to distribute. (R1.118) Moreover, the jury was never instructed on this essential element of the offenses charged. (TR.11:2381-2388) In fact, the jury was only instructed that they would have to find that Barrios conspired to possess and possessed with the intent to distribute *"a detectable amount of cocaine."* The Court of Appeals affirmed Barrios' conviction and sentence of 324 months imprisonment.

REASONS FOR GRANTING THE PETITION

I.

THE PANEL DECISION DIRECTLY CONFLICTS WITH THE DECISION OF THE UNITED STATES SUPREME COURT IN *APPRENDI V. NEW JERSEY*, 120 S.CT. 2348 (JUNE 26, 2000), AND OTHER CIRCUIT COURTS, SINCE THE SENTENCE IMPOSED OF 324 MONTHS IMPRISONMENT VIOLATES THE FIFTH AMENDMENT INDICTMENT AND DUE PROCESS CLAUSES, AS WELL AS THE SIXTH AMENDMENT NOTICE AND JURY TRIAL CLAUSES, WHERE THE INDICTMENT DID NOT CHARGE AN AMOUNT OF COCAINE, THE JURY WAS NOT INSTRUCTED AS SUCH, AND THE JURY MADE NO DETERMINATION REGARDING THIS ESSENTIAL ELEMENT OF THE OFFENSES CHARGED

In *Apprendi v. New Jersey*, 120 S.Ct. 2348 (June 26, 2000), this Court established a rule of constitutional law of general applicability, mandated by the Due Process Clause of the Fifth Amendment and by the notice and jury trial guarantees of the Sixth Amendment: "[A]ny fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." *Id.* at 43, *quoting Jones v. United States*, 526 U.S. 227, 243 n.6 (1999).

In a subsequent Federal decision addressing *Apprendi*, *United States v. Henderson*, ___ F.Supp.___, Crim. No. 2:99-00214-01 (S.D.W.Va. July 19, 2000), the court concluded that "[a]lthough arising in the context of a state hate crime statute, this Court finds that the sweeping pronouncements in *Apprendi* apply with equal force to

federal narcotics prosecutions under 21 U.S.C. sec. 841." *Id.* at 20. Ruling that the drug enhancement provisions are inapplicable at sentencing where no amount of drugs is alleged in the indictment and such element has not been presented to a jury, the court held that "[c]asting aside the artificial formalism and looking at the real effect of a drug amount finding, 21 U.S.C. sec. 841 sets forth separate offenses, rather than one offense with different penalties." *Id.* Thus, in a prosecution under 21 U.S.C. sec. 841, *et seq.*, "the government must, in order to seek increased statutory penalties, allege the drug amount in the indictment, submit that fact to the jury, and prove the existence of the fact beyond a reasonable doubt." *Id.* at 23. *see also United States v. Rogers*, 228 F.3d 1318 (11th Cir. 2000) (Eleventh Circuit follows Supreme Court in *Apprendi*, vacating and remanding Defendant's sentence for resentencing without reference to drug quantity, since drug quantity in sections 841(b)(1)(A) and (B) must be charged in indictment and proven to jury beyond a reasonable doubt.)

It was vigorously argued in the Supplemental brief filed by Barrios that his sentence of 324 months imprisonment is unconstitutional under the *Apprendi* decision. He was convicted of drug offenses in violation of 21 U.S.C. sec. 841(a)(1). The violations for which Barrios was convicted authorize a maximum of up to a life sentence *only if he possessed, conspired to possess, or distributed "5 kilograms or more" of cocaine.* 21 U.S.C. sec. 841(b)(1)(A)(ii). ***For smaller quantities of cocaine, the maximum statutory punishment is a 20-year sentence. see* 21 U.S.C. sec. 841(b)(1).**

The Indictment in this case only charged Appellant Barrios with the drug offenses involving "a detectable amount" of cocaine. The case proceeded to trial. The jury was not instructed on any specific amount of cocaine, and, in fact, were only instructed to find that the offenses involved a "detectable amount of cocaine." Because the jury was never instructed on this essential element of the Title 841 offenses, the jury never found that this element of the narcotics offenses was proven beyond a reasonable doubt. The jury consequently did not find that Barrios possessed, distributed, or conspired to possess or distribute any *specific quantity* of cocaine. As a result, Barrios' 324 month sentence runs afoul of *Apprendi*, because the maximum sentence to which he was subject (and which was imposed at sentencing) increased from 20 years (240 months) to 27 years (324 months) based on the quantity of cocaine – a fact that the jury had no part in adjudicating. Moreover, Appellant argued that, according to the United States Supreme Court, the amount of drugs at issue in a case is an element of the offense, since it affects the sentence imposed, and must be proven by the government to the jury beyond a reasonable doubt, and which *must be specifically charged in the Indictment.* The Indictment in this case only charged Barrios with conspiring to possess with the intent to distribute a *detectable amount of cocaine*!

Notably, the Indictment in this case violated the Fifth Amendment to the United States Constitution, which provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." In *Apprendi*, this Court recognized that the four corners of the indictment constrain

the sentencing jurisdiction of the district court. 120 S.Ct. at 2359 n.10 ("The judge's role in sentencing is constrained at its outer limits by the facts alleged in the indictment.") And, both this Court and the Eleventh Circuit have consistently held that a violation of the Fifth Amendment indictment clause is jurisdictional, and is reversible *per se* without proof of prejudice. *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Gayle*, 967 F.2d 483, 485 (11th Cir. 1992) (*en banc*).

Moreover, the Eleventh Circuit Court has reaffirmed the principle that jurisdictional defects are "unwaivable," noticeable by the Court at any time, and not subject to "prejudice" analysis. *See Harris v. United States*, 149 F.3d 1304, 1308-1309 (11th Cir. 1998). Thus, the Fifth Amendment violation is *per se* reversible, and requires a new sentencing hearing.

Further, both the Fifth Amendment Due Process Clause and the Sixth Amendment right to trial by jury clause together "entitle a criminal defendant to a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi* at 2356 (citations omitted). The indictment must set forth all of the elements of the offense and "fairly inform [ ] a defendant of the charge against which he must defend" at trial. *Hamling v. United States*, 418 U.S. 87, 117-118 (1974). In the case at bar, the indictment did not include any reference to a drug quantity, or to any enhanced offense under section 841(b). In our case, with notice of the drug quantity element, and an appropriate jury instruction as to quantity, the trial result could well have been affected.

Under the unique facts of this case, a new trial would be the most appropriate remedy for the failure to provide Barrios with Sixth Amendment "notice" of the charge, and the failure to instruct his jury as to the drug quantity. *See e.g. United States v. Slaughter*, ___ F.3d ___, 2000 WL 1803643 at 3 (5th Cir. Dec. 8, 2000). In the alternative, certiorari review of this case should be granted, so that this Court may remedy these constitutional violations by remanding Barrios' case for resentencing within the statutory maximum set forth in section 841(b)(1)(C). *See United States v. Aguayo-Delgado*, 220 F.3d 926 (8th Cir. 2000) (quantity of drugs is element of Title 21 section 841 and 846 offenses, which must be charged in indictment and found by jury beyond a reasonable doubt); *United States v. Norby*, 225 F.3d 1053 (9th Cir. 2000) (Court addressed constitutional issues raised by *Apprendi*, and found error was plain, requiring vacatur of defendant's sentence).

Moreover, in light of recent decisions in this Court, vacating decisions in many federal drug cases, certiorari review should be granted, and this case remanded to the Court of Appeals for re-sentencing in light of the *Apprendi* rule. *See e.g.* ; *Dore v. United States*, No. 00-5296, 121 S.Ct. ___, 2001 WL 32470 (Jan. 16, 2001); *Griffiths v. United States*, No. 00-6515, 121 S.Ct. ___, 2001 WL 32471 (Jan. 16, 2001); *Potts v. United States*, 121 S.Ct. 559 (Nov. 27, 2000); *Phillips v. United States*, No. 00-6571, 121 S.Ct. ___, 2001 WL 32473 (Jan. 16, 2001); *Garcia v. United States*, No. 00-463, 121 S.Ct. ___, 2001 WL 12402 (Jan. 8, 2001); *Burns v. United States*, 121 S.Ct. 32 (2000); *Wims v. United States*, 121 S.Ct. 32 (2000); *Brown v. United States*, 121 S.Ct. 295 (2000). The above vacated decisions involve pre-*Apprendi* sentencing.

II.

THERE IS A DIRECT CONFLICT BETWEEN THE CIRCUITS WHERE A *PER SE* REVIEW STANDARD IS BEING USED IN APPLYING THIS COURT'S DECISION IN *APPRENDI* WHEN THE DEFENDANT'S SENTENCE EXCEEDS THE STATUTORY MAXIMUM SENTENCE OF TWENTY (20) YEARS UNDER 21 U.S.C. SEC. (b)(1), BUT THE ELEVENTH CIRCUIT HAS HELD THAT "PLAIN ERROR" REVIEW APPLIES TO *APPRENDI* ERROR, BUT, EVEN UNDER THE "PLAIN ERROR" REVIEW, A SENTENCE THAT EXCEEDS THE STATUTORY MAXIMUM AFFECTS THE DEFENDANT'S SUBSTANTIAL RIGHTS

The Petitioner suggests that the Eleventh Circuit is applying an incorrect "plain error" standard of review in addressing *Apprendi* claims. Several Circuits have determined that where there is *Apprendi* error, there must be *per se* reversal of the sentence. *See e.g. United States v. Tran*, 234 F.3d 798 (2d Cir. 2000); *United States v. Jackson*, 240 F.3d 1240 (10th Cir. 2001); *United States v. Angle*, 230 F.3d 113 (4th Cir. 2000), *vacated pending en banc review* (Jan. 17, 2001).

Assuming, *arguendo*, that the standard of review is "plain error", any sentence above the statutory maximum sentence affects the defendant's substantial rights, and, therefore, meets the standard for remand and re-sentencing. Several Circuit Courts applying the plain error review standard have found that any sentence above the statutory maximum meets the "affect on substantial rights" test, and, reversal and resentencing is required. *See e.g. United States v. Meshack*, 225 F.3d 556 (5th Cir. 2000) (post-*Apprendi* case, holding that plain error review

applies, but sentence above statutory maximum meets "affect on substantial rights" test); *United States v. Page*, 232 F.3d 536 (6th Cir. 2000) (same); *United States v. Norby*, 225 F.3d 1053 (9th Cir. 2000) (an error that results in longer sentence undoubtedly affects substantial rights).

The Petitioner respectfully suggests that, since his sentence of 324 months imprisonment clearly exceeds the statutory maximum sentence, there is *per se* error, mandating reversal and resentencing. However, even if this Court should align with those Circuit Courts applying a plain error review standard, Appellant's sentence, which exceeds the statutory maximum sentence, affects his substantial rights, and, therefore, the error is plain.

CONCLUSION

For the reasons stated, the Petitioner prays that this Court issue a Writ of Certiorari and consider the decision below.

Respectfully submitted,

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10718
Non-Argument Calendar

D. C. Docket No. 95-00324-CR-LCN

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GILBERTO BARRIOS,
JOSE ANTONIO PEREZ,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Florida

(Filed Dec. 18, 2000)

Before BIRCH, BLACK and BARKETT, Circuit Judges.

PER CURIAM:

Appellants Gilberto Barrios and Jose Antonio Perez appeal their convictions for violations of 21 U.S.C. §§ 841(a)(1), 846, 952(a), and 963. Perez also appeals his sentence. Both Appellants argue the district court erred in (1) not dismissing the indictment for delay in indicting them and bringing them to trial, and (2) denying their motions for judgments of acquittal pursuant to Fed. R. Crim. P. 29. Perez challenges his sentence, claiming (3)

the court erred in denying 2-level reductions for acceptance of responsibility, U.S. Sentencing Guidelines Manual § 3E1.1, playing a minor role, *id.* § 3B1.2, and fulfilling the "safety valve" requirements, *id.* § 2D1.1(b)(6). Perez also claims (4) under *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000), the sentence of 262 months' imprisonment should be vacated and a sentence of 240 months or less should be imposed pursuant to 21 U.S.C. § 841(b)(1)(C). Barrios challenges (5) the admission of drug ledgers, testimony identifying drug ledger entries, hearsay, and evidence of bad acts under Fed. R. Evid. 404(b), as well as the exclusion of evidence bolstering the credibility of the Government's case. Barrios also contends (6) the district court erred in not granting a new trial due to the Government's alleged improper vouching for its witnesses and alleged misconduct in closing arguments. We discuss only the first four issues.[1]

With respect to the first issue, a mixed question of law and fact, we review the questions of law de novo, and the findings of fact under the clearly erroneous standard. *See United States v. Clark*, 83 F.3d 1350, 1352 (11th Cir. 1996). Barrios, prior to trial, filed a motion to dismiss the indictment for pre- and post-indictment delay. Perez did not file a motion and did not join Barrios' motion. Perez expressed an interest in joining the motion only after testimony had begun. Since Perez did not raise this objection to the indictment prior to trial, his objection is deemed waived. *See* Fed. R. Crim. P. 12(b)(2). *See also United States v. Lerma*, 657 F.2d 786, 789-90 (5th Cir. Unit A

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[1] We affirm the remaining issues on appeal pursuant to 11th Cir. R. 36-1.

Sept. 1981) (citing *United States v. Freeman*, 619 F.2d 1112, 1118 (5th Cir. 1980)). Furthermore, since Barrios does not raise the issue of pre-indictment delay on appeal, we consider it abandoned. *See United Staes v. Cunningham*, 161 F.2d 1343, 1344 (11th Cir. 1998).

As to the post-indictment delay alleged by Barrios, there are four factors to consider: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right; and (4) the prejudice to the defendant. See *United States v. Register*, 182 F.3d 820, 827 (11th Cir. 1999) (citing *Barker v. Wingo*, 407 U.S. 514, 530-32, 92 S. Ct. 2182, 2192-93 (1972)). Barrios satisfies the first prong, as 30 months passed from Barrios' arrest until the start of the trial. *See Doggett v. United States*, 505 U.S. 647, 652, n. 1, 112 S. Ct. 2686, 2691, n. 1 (1992) (post-indictment delay of at least one year is generally considered prejudicial).

That the delay in government action has not been shown to stem from bad faith or dilatory government action, however, cuts strongly against Barrios's position. *See United States v. Schlei*, 122 F.3d 944, 987 (11th Cir. 1997). Since at least one of the factors cuts against Barrios's position, Barrios must show actual prejudice. *See United States v. Davenport*, 935 F.2d 1233, 1239 (11th Cir. 1991). Barrios's arguments that he has suffered prejudice as a result of the fading memories of his potential alibi witnesses is not sufficient for Barrios to meet his burden. *United States v. Avalos*, 541 F.2d 1100, 1116 (11th Cir. 1976). We therefore hold the district court did not err in dismissing Barrios' motion to dismiss the indictment for post-indictment delay.

With respect to the motions for judgment of acquittal, we review de novo, making all reasonable inferences and credibility determinations in favor of the jury's verdict. *See United States v. Gamboa*, 166 F.3d 1327, 1331 (11th Cir. 1999); *United States v. Ramsdale*, 61 F.3d 825, 828 (11th Cir. 1995). We cannot reverse a conviction for insufficiency of evidence unless "no reasonable jury could find proof of guilt beyond a reasonable doubt." *United States v. Jones*, 913 F.2d 1552, 1557 (11th Cir. 1990).

The Government satisfied the elements to establish Appellants conspired to import and distribute drugs: (1) a conspiracy to import and distribute drugs existed, (2) Appellants had knowledge of it, and (3) Appellants voluntarily became a part of the conspiracy. *United States v. Bascaro*, 742 F.2d 1335, 1359 (11th Cir. 1984).

(1) The Government proved the existence of the large-scale, bi-coastal Falcon/Magluta drug conspiracy; the Government's use of circumstantial evidence and inferences from co-conspirators' actions was permissible. *United States v. Obregon*, 893 F.2d 1307, 1311 (11th Cir. 1990). (2) Appellants' actions evince their knowledge that the drugs were imported and would be distributed. The Government showed at trial that Perez was repeatedly present at the scene of large-scale cocaine deliveries in California, and he patrolled the gate where the cocaine was picked up for delivery. The Government also showed Barrios participated extensively in the cross-country transport of massive quantities of cocaine by arranging for its pick-up, delivery, and storage, and for cash payments to suppliers. We have held similar factors, such as the massive quantity of drugs, the frequency of interaction with co-conspirators, and presence at "stash houses,"

are sufficient to find knowledge of drug importation. *Bascaro*, 742 F.2d at 1359-60. This evidence also easily shows knowledge that the cocaine would be distributed. (3) There is not showing that Appellants acted involuntarily. In establishing these three prongs, the Government has satisfied its burden to "come forward with slight evidence to connect a particular defendant to the conspiracy[]" to import and distribute cocaine. *United States v. Calderon*, 127 F.3d 1314, 1326 (11th Cir. 1997).

The Government also satisfied the elements to establish Barrios possessed cocaine with intent to distribute: (1) knowledge, (2) possession, and (3) intent to distribute. *Gamboa*, 166 F.3d at 1331. In orchestrating co-conspirators for the pick-up, delivery, and storage of cocaine, Barrios exhibited the requisite knowledge and intent to distribute. These actions also show Barrios' dominion and control over the drugs. Such constructive possession is sufficient to satisfy the possession element. *Id.* We thus hold the district court did not err in denying Appellants' respective motions for judgment of acquittal.

We review Perez's criminal history categorization and the denial of sentencing reductions as factual determinations that must be affirmed unless clearly erroneous. *United States v. Hromada*, 49 F.3d 685, 688-89 (11th Cir. 1995). We affirm the district court's denial of the reduction for acceptance of responsibility, U.S. Sentencing Guidelines Manual § 3E1.1 (1999), based on its determination that Perez had not "unequivocally" accepted responsibility for his crimes. According to the probation officer, Perez, in his statement, "fails to discuss his role or conduct in the instant offense . . . [and] makes a general and overly broad statement of acceptance of responsibility."

Presentence Investigation Report, Addendum at 2. See *id.* ¶ 29 for Perez's statement. Further, the Government's failure to offer Perez a plea agreement that was favorable to him did not preclude his pleading guilty. While "[c]onviction by trial does not automatically preclude a defendant from consideration" for an acceptance of responsibility reduction, only the "rare" defendant who proceeds to trial may benefit from this reduction. U.S. Sentencing Guidelines Manual § 3E1.1, cmt. n.2. One example of this rare circumstance is when a defendant goes to trial to preserve issues not related to factual guilt, such as constitutional or statutory challenges. *Id.* This type of circumstance does not apply here. *See also United States v. Gonzales*, 70 F.3d 1236, 1239 (11th Cir. 1995).

As to the district court's denying the "safety valve" limitation and accepting criminal history category II for Perez, U.S. Sentencing Guidelines Manual §§ 5C1.2, 4A1.1(a), Perez concedes he was indicted in case number 97-882-CR-Ungaro-Benages prior to going to trial in the instant case. He further concedes he negotiated a plea for 135 months' imprisonment in the former case, in which he was considered to be a first-time offender. Perez argues he should have been permitted to plead concurrently in the two cases. He then would not have accrued the three criminal history points and would have been eligible for the "safety valve," which is available only to those with no more than one criminal history point. We find no clear error in the district court's sentencing Perez based on a prior conviction and without the opportunity to plead concurrently in the two cases. *See, e.g., United States v. Rice*, 43 F.3d 601, 606 (11th Cir. 1995). The imposition of Appellant's concurrent sentences does not create

the presumption that the underlying convictions are related. *See id.* at 607. The district court thus did not clearly err in allotting Appellant three criminal history points and criminal history category II and denying him the "safety valve" limitation. *See* Presentence Investigation Report ¶ 41; U.S. Sentencing Guidelines Manual, Ch. 5, Pt. A; *id.* § 5C1.2(1).

We also affirm the district court's denial of a sentencing reduction based on Perez's playing a minor role in the crime. *Id.* § 3B1.2. We agree with the district court that Perez played a large and crucial role in receiving the cocaine and providing access to locked areas for drug and cash deliveries. We note Perez was more responsible than the truck drivers and the stash house operators. *See* Presentence Investigation Report, Addendum at 2-3.

Finally, we hold the district court did not commit plain error under *Apprendi v. New Jersey*, ___ U.S. ___, 120 S. Ct. 2348 (2000), in sentencing Perez to 262 months' imprisonment and five years' supervised release and sentencing Barrios to 324 months' imprisonment and five years' supervised release.[2] Since the issues of the absence of drug quantity in the indictment and the district court's failure to submit the question of drug quantity to the jury were not raised at trial, we use the plain error standard on review. "Before an appellate court can correct an error

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[2] This analysis encompasses only the charge against Appellants of conspiring to possess with intent to distribute cocaine, 21 U.S.C. §§ 841(a)(1), 846, and the charge against Barrios of possessing with intent to distribute cocaine. *Id.* §§ 952(a), 963, lacks a statutory sentencing maximum and thus falls outside the purview of *Apprendi*.

not raised at trial, there must be (1) error, (2) that is plain, and (3) that affect[s] substantial rights. . . . If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Swatzie*, 228 F.3d 1278, 1281 (11th Cir. 2000) (quoting *Johnson v. United States*, 520 U.S. 461, 466-67, 117 S. Ct. 1544, 1548-49 (1997)).

We assume arguendo Appellants' sentences were imposed in error and these errors were plain. *See id.* at 1282. We then turn to whether Appellants' substantial rights were affected by these errors. A drug quantity of at least 150 kilograms was apparently uncontroverted by Perez, both at trial and at sentencing. Barrios apparently delivered 12-15 shipments of cocaine, ranging from 800-1200 kilograms, to a co-conspirator. *See* Presentence Investigation Report ¶ 23. We find there is no evidentiary basis for the jury reasonably to have found that Appellants committed the charged crimes without also finding Appellants were responsible for at least 5 kilograms of cocaine, as required by 21 U.S.C. § 841(b)(1)(A)(ii)(II). *See Swatzie*, 228 F.3d at 1283. *See also* Presentence Investigation Report ¶ 72. As long as the jury found Appellants responsible for at least 5 kilograms of cocaine, Appellants' substantial rights were not affected by the imposed sentences. *See Swatzie*, 228 F.3d at 1283. On this basis, we hold these sentences are not reversible under the plaint error standard.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10718-EE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

GILBERTO BARRIOS,
JOSE ANTONIO PEREZ,

Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

(Filed Mar. 1, 2001)

BEFORE: BIRCH, BLACK and BARKETT, Circuit Judges

PER CURIAM:

The petition(s) for rehearing filed by Appellant, Gilberto Barrios, is DENIED.

ENTERED FOR THE COURT:

/s/ Susan Black
UNITED STATES CIRCUIT JUDGE
